Dato' Seri Mak Hon Leong & Anor v NWP Holdings Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-186–04 OF 2021
ADLIN ABDUL MAJID JC
2 JULY 2021

Companies and Corporations — Meetings — Extraordinary general meeting ('EGM') — Plaintiffs gave notice calling for EGM and requested for defendant's records of depositors — Whether plaintiffs entitled to records of depositors of defendant — Whether any defect or irregularity in short notice calling for EGM could be rectified — Companies Act 2016 s 582

The plaintiffs filed an originating summons seeking orders for, inter alia, records of depositors of the defendant to be provided to them, and for any defects or irregularities in the short notice calling for the extraordinary general meeting of the defendant on 19 May 2021 ('EGM') to be rectified. The plaintiffs were shareholders of the defendant, and they collectively hold at least 10% of the issued share capital of the defendant. BSR was the share registrar of the defendant pursuant to the Securities Industry (Central Depositories) Act 1991 ('the SICDA'). By a letter dated 15 April 2021 from the plaintiffs to the board of directors the defendant, the plaintiffs informed the board of their intention to call for the EGM pursuant to s 310(b) of the Companies Act 2016 ('the CA'). In the letter, the plaintiffs requested for the defendant's records of depositors. The same request was also made to BSR. The plaintiffs did not receive any responses and as such, the plaintiffs issued a letter of demand dated 21 April 2021 to the defendant and BSR demanding that the records of depositors be furnished to them on 22 April 2021. The defendant responded by way of a letter dated 22 April 2021. In the letter, the defendant: (a) referred to s 34(6) of the SICDA which provided that the copy of the record of depositors required under s 34(5) shall be supplied to the person who requires such copy within a period of 21 days or within such longer period, commencing from the day after the date of receipt of the request by the issuer; and (b) informed the plaintiffs that the defendant had announced on Bursa Malaysia that it was in the midst of seeking legal advice on the plaintiffs' notice dated 15 April 2021. The defendant also explained that the board of directors of the defendant would be meeting to assess and deliberate the matter. In response, the plaintiffs filed this originating summons. The issues for consideration were: (i) whether the plaintiffs were entitled to the records of depositors of the defendant, and if so, when the records should be provided; and (ii) whether any defect or irregularity in the short notice calling for the EGM could be rectified pursuant to s 582 of the CA.

Held, granting the orders prayed for in the originating summons:

(1) The plaintiffs were entitled to the records of depositors, for the purpose of the EGM. The only response received from the defendant, to the plaintiffs' letter dated 15 April 2021, was the letter dated 22 April 2021. There was no indication in the defendant's letter that the defendant was taking or had taken steps to provide the records of depositors to the plaintiffs, although the defendant was aware that the EGM was to be convened on 19 May 2021. The time period imposed by the plaintiffs was not unreasonable and was sufficient to ensure compliance with legal and procedural requirements, for as long as prompt action was taken by the defendant to facilitate the request of the plaintiffs. Furthermore, the directors of the defendant should facilitate the convening of the EGM, rather than impede or frustrate the meeting. Therefore, the plaintiffs were entitled to the record of depositors of the defendant, and the defendant and/or BSR were compelled to provide the plaintiffs with: (a) the first record of depositors on 7 May 2021; and (b) the second record of depositors on 17 May 2021 (see paras 17 & 23–26).

(2) The defendant's constitution imposed a requirement that a notice convening a meeting must be given to members at least 14 clear days before the meeting. With the first record of depositors only due to be provided to the plaintiffs on 7 May 2021, it was clear that this requirement will not be met. Therefore, there would in fact be an irregularity in the notice period for the calling of the EGM, which required validation by the court. This was a fit and proper case for an order under s 582 of the CA to be granted. Thus, the plaintiffs' prayer in the originating summons for an order that any defects or irregularities in the short notice of the EGM shall be rectified pursuant to s 582 of the CA was allowed (see paras 30–32).

[Bahasa Malaysia summary

Plaintif memfailkan saman pemula bagi memohon perintah, antara lain, rekod pendeposit defendan untuk diberikan kepada mereka, dan untuk sebarang kecacatan atau ketidakpatuhan dalam notis singkat memanggil mesyuarat agung luar biasa defendan pada 19 Mei 2021 ('EGM') untuk diperbetulkan. Plaintif adalah pemegang saham defendan, dan mereka secara kolektif memegang sekurang-kurangnya 10% daripada modal saham terbitan defendan. BSR adalah pendaftar saham defendan menurut Akta Perindustrian Sekuriti (Depositori Pusat) 1991 ('APSDP'). Melalui surat bertarikh 15 April 2021 daripada plaintif kepada lembaga pengarah defendan, plaintif memaklumkan lembaga pengarah niat mereka untuk memanggil EGM menurut s 310(b) Akta Syarikat 2016 ('AS'). Dalam surat itu, plaintif meminta rekod pendeposit defendan. Permintaan yang sama juga dibuat kepada BSR. Plaintif tidak menerima sebarang maklum balas dan oleh itu, plaintif mengeluarkan surat tuntutan bertarikh 21 April 2021 kepada defendan dan

A BSR menuntut supaya rekod pendeposit diberikan kepada mereka pada 22 April 2021. Defendan telah menjawab melalui surat bertarikh 22 April 2021. Dalam surat tersebut, defendan: (a) merujuk kepada s 34(6) APSDP yang memperuntukkan salinan rekod pendeposit dikehendaki di bawah s 34(5) hendaklah dibekalkan kepada orang yang memerlukan salinan B sedemikian dalam tempoh 21 hari atau dalam tempoh yang lebih lama itu, bermula dari hari selepas tarikh penerimaan permintaan oleh pengeluar; dan (b) memaklumkan plaintif bahawa defendan telah mengumumkan di Bursa Malaysia bahawa ia sedang mendapatkan nasihat undang-undang mengenai notis plaintif bertarikh 15 April 2021. Defendan juga menjelaskan bahawa C lembaga pengarah defendan akan bermesyuarat untuk menilai dan membincangkan perkara itu. Sebagai balasan, plaintif memfailkan saman pemula ini. Isu-isu untuk pertimbangan adalah: (i) sama ada plaintif berhak mendapat rekod pendeposit defendan, dan jika ya, bila rekod itu perlu disediakan; dan (ii) sama ada sebarang kecacatan atau ketidakpatuhan dalam D notis singkat memanggil EGM boleh diperbetulkan menurut s 582 AS.

Diputuskan, membenarkan perintah seperti dipohon dalam saman pemula:

(1) Plaintif berhak mendapat rekod pendeposit, untuk tujuan EGM. E Satu-satunya maklum balas yang diterima daripada defendan, kepada surat plaintif bertarikh 15 April 2021, adalah surat bertarikh 22 April 2021. Tiada petunjuk dalam surat defendan bahawa defendan sedang mengambil atau telah mengambil langkah untuk memberikan rekod pendeposit kepada plaintif, walaupun defendan sedar bahawa EGM akan F diadakan pada 19 Mei 2021. Tempoh masa yang dikenakan oleh plaintif adalah munasabah dan mencukupi untuk memastikan pematuhan kepada keperluan undang-undang dan prosedur, selagi tindakan segera diambil oleh defendan untuk melancarkan permintaan plaintif. Tambahan pula, pengarah defendan harus memudahkan mesyuarat G EGM, bukannya menghalang atau menggagalkan mesyuarat itu. Oleh itu, plaintif berhak mendapat rekod pendeposit defendan, dan defendan dan/atau BSR terpaksa memberikan plaintif: (a) rekod pertama pendeposit pada 7 Mei 2021; dan (b) rekod kedua pendeposit pada 17 Mei 2021 (lihat perenggan 17 & 23–26).

H (2) Perlembagaan defendan mengenakan keperluan bahawa notis mengadakan mesyuarat mesti diberikan kepada ahli sekurang-kurangnya 14 hari sebelum mesyuarat. Dengan rekod pertama pendeposit hanya akan diberikan kepada plaintif pada 7 Mei 2021, adalah jelas bahawa keperluan ini tidak akan dipenuhi. Oleh itu, akan berlaku I ketidakpatuhan dalam tempoh notis untuk panggilan EGM, yang memerlukan pengesahan oleh mahkamah. Ini adalah kes yang sesuai dan wajar untuk perintah di bawah s 582 CA diberikan. Oleh itu, permohonan plaintif dalam saman pemula untuk perintah bahawa sebarang kecacatan atau ketidakpatuhan dalam notis singkat EGM

hendaklah diperbetulkan menurut s 582 CA telah dibenarkan (lihat perenggan 30–32).]

Cases referred to

Chong Mei Ling & Ors v Apft Bhd & Ors [2018] MLJU 1941; [2018] 1 LNS 2051, HC (refd)

Indian Corridor Sdn Bhd v Golden Plus Holdings Bhd [2008] 3 MLJ 653; [2008] 5 CLJ 774, CA (refd)

Seacera Group Berhad v Dato' Tan Wei Lian & Ors [2019] MLJU 470; [2019] 1 LNS 762, HC (refd)

Legislation referred to

Companies Act 2016 ss 55(2), 147(1), 310, 310(b), 316(2)(b), 321(1), 582, 582(1)

Securities Industry (Central Depositories) Act 1991 s 34, 34(5), 34(6)

Eric Tan Choon Heong (Michelle Siah Yi Yen with him) (Ong Kok Bin & Co) for the plaintiffs.

New Sin Yew (Ahmad Zhafir Rahmat with him) (AmerBON) for the defendant.

Adlin Abdul Majid JC:

INTRODUCTION

[1] The plaintiffs filed an originating summons seeking orders for, inter alia, records of depositors of the defendant to be provided to them, and for any defects or irregularities in the short notice calling for the extraordinary general meeting of the defendant on 19 May 2021 ('EGM') to be rectified.

[2] After hearing the parties, I have substantially granted the orders prayed for in the originating summons.

BACKGROUND FACTS

[3] The plaintiffs are shareholders of the defendant, and they collectively hold at least 10% of the issued share capital of the defendant.

[4] BSR is the share registrar of the defendant pursuant to the Securities Industry (Central Depositories) Act 1991 ('the SICDA').

[5] The facts leading up to the filing of the originating summons are as follows:

(a) by a letter dated 15 April 2021 from the plaintiffs to the board of directors the defendant, the plaintiffs informed the board of their

A intention to call for the EGM pursuant to s 310(b) of the Companies Act 2016 ('the CA'). In the letter, the plaintiffs requested for the defendant's records of depositors;

(b) the same request was made to BSR, by way of a letter of the same date, from the plaintiffs to BSR;

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(c) the plaintiffs did not receive responses to either letter;

(d) as such, the plaintiffs' solicitors issued a letter of demand dated 21 April 2021 to the defendant and BSR, demanding that the records of depositors be furnished to them by 5pm on 22 April 2021; and

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(e) the defendant responded by way of a letter dated 22 April 2021. In the letter, the defendant:

(i) referred to s 34(6) of the SICDA. Section 34(6) provides that the copy of the record of depositors required under s 34(5) shall be supplied to the person who requires such copy within a period of 21 days or within such longer period, commencing from the day after the date of receipt of the request by the issuer; and

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(ii) informed the plaintiffs' solicitors that the defendant had announced on Bursa Malaysia that it is in the midst of seeking legal advice on the plaintiffs' notice dated 15 April 2021. The defendant also explained that the board of directors of the defendant will be meeting to assess and deliberate the matter.

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[6] In response, the plaintiffs filed the originating summons.

ISSUES

G **[7]** From the originating summons, the following issues require the court's consideration and determination:

(a) whether the plaintiffs are entitled to the records of depositors of the defendant, and if so, when the records should be provided; and

H (b) whether any defect or irregularity in the short notice calling for the EGM can be rectified pursuant to s 582 of the CA.

[8] These issues are considered below.

I *Whether the plaintiffs are entitled to the records of depositors of the defendant, and if so, when the records should be provided*

[9] During the hearing of the originating summons, counsel for the plaintiffs, Mr Eric Tan, informed the court that the defendant will not be

objecting to the plaintiffs' request to the records of depositors. Thus, it is sufficient to address this part of the issue by highlighting the pertinent points raised by Mr Tan, which he submitted in support of the plaintiffs' request.

[10] The plaintiffs require the records of depositors in order to call for a meeting of members of the defendant, pursuant to s 310 of the CA. Section 310(b) of the CA provides that a member of a company holding at least 10% of the issued share capital of a company or a lower percentage as specified in the constitution, has the power to convene a meeting of members of the company. It is not disputed that the plaintiffs hold at least 10% of the issued share capital of the defendant.

[11] The power to convene a general meeting is recognised as one of the key rights provided to members. Learned counsel for the plaintiffs referred to *Seacera Group Berhad v Dato' Tan Wei Lian & Ors* [2019] MLJU 470; [2019] 1 LNS 762, where Ong Chee Kwan JC held that:

> [92] Every shareholder of a company has a right, subject to the statutory prescribed procedures and requirements, to call for an extraordinary general meeting of a company under our CA. A shareholder's right to convene a general meeting under s 310(b) of the CA is one of the key rights provided by law to shareholders to marshal all shareholders of a company together at an appointed date, place and time to provide the opportunity to the shareholders to deliberate and to resolve, if deem fit, on proposals properly tabled before them that may affect the directions of the company. It is an essential right to invoke the internal democratic process of the company.

[12] Meetings of members are required to be called by way of notices, and notices are to be issued in accordance with timelines prescribed in the CA and in the constitution of a company.

[13] Section 316(2)(b) of the CA provides that a meeting of members of a public company (other than a meeting for the passing of a special resolution) shall be called by notice of at least 14 days or any longer period specified in the company's constitution. This timeline applies in the case of a meeting other than an annual general meeting, and would apply to the EGM.

[14] In relation to the recipient of the notice, s 321(1) of the CA provides that the notice of a meeting of members shall be given to every member, director and auditor of the company.

[15] In this regard, a depositor whose name appears in the record of depositors maintained by the central depository in accordance with s 34 of the SICDA is a member of the company (see s 147(1) of the CA and *Seacera Group Berhad v Dato' Tan Wei Lian & Ors* [2019] MLJU 470; [2019] 1 LNS 762).

[16] Thus, it is essential for a person calling for a meeting of members of a company to be furnished with a copy of the record of depositors, for the purpose of issuing a notice of the meeting to members of the company. The following provisions are relevant:

(a) s 34(5) of the SICDA, which provides that any member of an issuer may require the issuer to furnish him with a copy of the record of depositors, subject to the necessary payment being made; and

(b) section 7.18(1) of the Main Market Listing Requirements, which provides that a company shall request Bursa Malaysia Depository Sdn Bhd to issue a record of depositors to whom notices of general meetings shall be given by the company.

[17] Based on the above, it is clear that the plaintiffs are entitled to the records of depositors, for the purpose of the EGM. However, the timeline for the defendant to furnish the records remained an issue of contention between the parties during the hearing. Learned counsel for the defendant, Mr New Sin Yew, submitted that the time periods to adhere to requests for records of depositors by members are afforded by law. He made reference to the following provisions:

(a) s 34(6) of the SICDA: The copy of the record of depositors, or any part thereof, required under subsection (5) *shall be supplied to the person who required such copy within a period of twenty-one days* or within such longer period as the (Securities) Commission considers reasonable in the circumstances, *commencing from the day after the date of receipt of the request by the issuer*. (Emphasis added.)

(b) s 55(2) of the CA: Any member or other person may request the company to furnish him with a copy of the register, or of any part the register, but only so far as it relates to names, addresses, number of shares held and amounts paid on shares, on payment in advance of ten ringgit or such lesser sum as the company requires for every hundred words or fractional part of the register required to be copied and *the company shall cause any copy requested by any person to be sent to that person within a period of twenty-one days* or within such period as the Registrar considers reasonable *from the day on which the request is received by the company*. (Emphasis added.)

[18] Mr New argued that since a reasonable time period is provided clearly and expressly in the law, the plaintiffs and the defendant must abide by the time period imposed.

[19] It is important at this juncture to return to the background facts of this matter:

(a) the plaintiffs requested for the records of depositors from the board of directors of the defendant by a letter dated 15 April 2021;

(b) the same request was also made to BSR, by way of a letter of the same date from the plaintiffs to BSR;

(c) the plaintiffs' solicitors issued a letter of demand dated 21 April 2021 to the defendant and BSR, demanding that the records of depositors be furnished to them by 5pm on 22 April 2021; and

(d) the defendant responded by way of a letter dated 22 April 2021, referring to s 34(6) of the SICDA, and informing the plaintiffs that it is in the midst of seeking legal advice on the plaintiffs' notice dated 15 April 2021.

[20] Pursuant to s 34(6) of the SICDA, the defendant would have 21 days from 15 April 2021 to respond to the request by the plaintiffs for the records of depositors. The defendant argues that as at the filing of the originating summons on 23 April 2021, only eight days had passed since the request. The defendant further argues that if indeed there was any urgency, it was caused by the plaintiffs' own actions in setting such a strict timeline for the EGM.

[21] A similar argument that was put forward by the defendant in this case was argued by the plaintiff in *Seacera Group Berhad v Dato' Tan Wei Lian & Ors* [2019] MLJU 470; [2019] 1 LNS 762. The plaintiff in that case submitted that pursuant to s 55(2) of the CA, the defendants had 21 days to provide the plaintiff with the record of depositors. Ong Chee Kwan JC held as follows:

> [102] The plaintiff's reliance on s 55(2) of the CA is misplaced. The said Section refers to the company's register of members which is different from the record of depositors.
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> [103] In any case, s 55(2) of the CA stipulates that 'the company shall cause any copy requested by any person to be sent to that person *within* a period of twenty-one days ...' (Emphasis added.) *This does not mean that the company is entitled to take its own time or to dictate the time for collection of the record of depositors as long as the same is made available within 21 days*.
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> [104] *What constitutes a reasonable time will of course depends on the facts and circumstances of each case bearing in mind the duty of the company to act in a manner that serves the best interest of the company. This must include the duty to facilitate the compliance of all procedural requirements for the convening of a general meeting*. Any acts taken that are contrary to this objective or for an improper reason will be an abuse of the power conferred on the company. (Emphasis added.)

[22] I am of the view that the above assessment of the learned judicial commissioner would similarly apply to the 21 day timeline for the provision of record of depositors imposed in s 34(6) of the SICDA.

[23] It is undisputed that the only response received from the defendant, to the plaintiffs' letter dated 15 April 2021, is the letter dated 22 April 2021. The plaintiffs' letter contained a notice of the plaintiff's intention to convene the EGM on 19 May 2021. There was no indication in the defendant's letter that the defendant was taking or had taken steps to provide the records of depositors to the plaintiffs, although the defendant was aware that the EGM was to be convened on 19 May 2021.

[24] Counsel for the defendant argued that the plaintiffs had by their own design, put themselves in a difficult position. This is due to the fact that the plaintiffs had only allowed a little more than a month from the date of the letter dated 15 April 2021, for the EGM to be convened. I am however of the view that the time period imposed by the plaintiffs is not unreasonable and is sufficient to ensure compliance with legal and procedural requirements, for as long as prompt action is taken by the defendant to facilitate the request of the plaintiffs. In *Seacera Group Berhad v Dato' Tan Wei Lian & Ors* [2019] MLJU 470; [2019] 1 LNS 762, Ong Chee Kwan JC made the following observation:

> [105] A shareholder exercising his power under s 310(b) of the CA *is entitled to determine for himself the appropriate date and time for his proposed general meeting taking into consideration the reasonable time needed to meet all the necessary procedural requirements under the CA and the Constitution of the company*. He is entitled to assume that the company will not deliberately act in any way to frustrate and or defeat the convening of the general meeting.

[25] Also relevant is s 213(1) of the CA, which imposes a duty on directors of a company to exercise their powers in accordance with the CA, for a proper purpose and in good faith in the best interest of the company. Thus, I agree with the submission of learned counsel for the plaintiffs, that the directors of the defendant should facilitate the convening of the EGM, rather than impede or frustrate the meeting. There are sufficient examples of the granting of orders by courts for parties to furnish records of depositors, to ensure that meetings are able to be convened. These include *Indian Corridor Sdn Bhd v Golden Plus Holdings Bhd* [2008] 3 MLJ 653; [2008] 5 CLJ 774 and *Chong Mei Ling & Ors v Apft Bhd & Ors* [2018] MLJU 1941; [2018] 1 LNS 2051.

[26] Taking the above into account, I granted the following orders:

(a) a declaration that the plaintiffs are entitled to the record of depositors of the defendant on the basis of meeting the timeline to comply with the requirements of the notice of the EGM; and

(b) an order to compel the defendant and/or BSR to provide the plaintiffs with:

(i) the defendant's first record of depositors up to 30 April 2021, on or

before 4pm on 7 May 2021, to facilitate the dispatch of the notice of the EGM; and

(ii) the defendant's second record of depositors up to 11 May 2021, on or before 4pm on 17 May 2021, which is a record prepared not less than three market days before the date of the EGM.

Whether any defect or irregularity in the short notice calling for the EGM can be rectified pursuant to s 582 of the CA

[27] Section 582 of the CA provides that:

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court.

(2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

[28] Counsel for the defendant submitted that an order pursuant to s 582 of the CA is premature and would be akin to 'putting the cart before the horse'. An application for validation of any defect, irregularity or deficiency, he argued, should be made once there is a defect, irregularity or deficiency to invalidate.

[29] In considering the defendant's argument, it is important to note that the EGM was due to be convened on 19 May 2021. The first record of depositors can only be provided to the plaintiffs on 7 May 2021.

[30] The defendant's constitution imposes a requirement that a notice convening a meeting must be given to members at least 14 clear days before the meeting. This is also in line with the timeline imposed in s 316(2)(b) of the CA. With the first record of depositors only due to be provided to the plaintiffs on 7 May 2021, it is clear that this requirement will not be met.

[31] Therefore, there will in fact be an irregularity in the notice period for the calling of the EGM, which requires validation by this court. This irregularity is not merely theoretical. Referring again to *Seacera Group Berhad v Dato' Tan Wei Lian & Ors* [2019] MLJU 470; [2019] 1 LNS 762, it is pertinent to note that Ong Chee Kwan JC observed in para 83 of his judgment, that the extraordinary general meeting in that case can be validated if the defendants seek to rely on s 582(1) of the CA.

[32] Considering the timelines in this case before me, I find that this is a fit

A and proper case for an order under s 582 of the CA to be granted. Thus, I allowed the plaintiffs' prayer in the originating summons for an order that any defects or irregularities in the short notice of the EGM shall be rectified pursuant to s 582 of the CA.

B DECISION

[33] The following orders were granted:

(a) a declaration that the plaintiffs are entitled to the record of depositors of the defendant on the basis of meeting the timeline to comply with the requirements of the notice of the EGM;

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(b) an order to compel the defendant and/or BSR to provide the plaintiffs with:

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(i) the defendant's first record of depositors up to 30 April 2021, on or before 4pm on 7 May 2021, to facilitate the dispatch of the notice of the EGM; and

(ii) the defendant's second record of depositors up to 11 May 2021, on or before 4pm on 17 May 2021, which is a record prepared not less than three market days before the date of the EGM.

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(c) an order that any defects or irregularities in the short notice of the EGM be rectified pursuant to s 582 of the CA.

F *Orders prayed for in originating summons granted.*

Reported by Nabilah Syahida Abdullah Salleh

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